



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF T-C-M- CO.

DATE: OCT. 17, 2019

**APPEAL OF NEBRASKA SERVICE CENTER DECISION**

**PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER**

The Petitioner, a management consulting firm specializing in financial services, seeks to employ the Beneficiary as a senior consultant-systems analyst. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master’s degree, or a bachelor’s degree followed by five years of experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary’s possession of a degree in a field of study required by the offered position.

On appeal, the Petitioner argues that, consistent with the position’s requirements, the record establishes the Beneficiary’s possession of a foreign equivalent of a U.S. master’s degree in the acceptable field of information systems.

Upon *de novo* review, we will withdraw the Director’s decision and remand the matter for entry of a new decision consistent with the following analysis.

**I. EMPLOYMENT-BASED IMMIGRATION**

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a

petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

## II. THE EDUCATIONAL REQUIREMENTS

A petitioner must establish that a beneficiary met all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).<sup>1</sup> In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the minimum requirements of the offered position of senior consultant-systems analyst as a U.S. master's degree, or a foreign equivalent degree, in "Information Sys[tems]," electrical engineering, computer engineering, or computer science, plus one year of experience in the job offered or as a senior software engineer. The labor certification also indicates the Petitioner's acceptance of an alternate combination of education and experience in the form of an "Other" educational credential and five years of experience. In part H.8-B. of the labor certification, the Petitioner specified the alternate educational level as a "BS+ exp. Will accept any suitable combo of education, experience, or training."

The Director concluded that the Beneficiary's master's degree was not in one of the allowed fields of study. However, upon review of the record, including materials submitted on appeal, we conclude that a preponderance of evidence establishes the Beneficiary's possession of a foreign equivalent degree in a field of study acceptable for the offered position. We will therefore withdraw the Director's decision to the contrary.

## III. VALIDITY OF THE LABOR CERTIFICATION

The appeal overcomes the petition's denial ground. But the record does not establish the filing's approvability. The Petitioner has not demonstrated that the accompanying labor certification supports the requested classification.

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). The labor certification "must demonstrate that the job requires a professional holding an advanced degree." *Id.* The term "advanced degree" means

any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign

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<sup>1</sup> This petition's priority date is June 7, 2018, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

As previously indicated, the labor certification here states the Petitioner's acceptance of an alternate combination of education and experience. Instead of selecting "Bachelor's" in part H.8-A. of the labor certification, the Petitioner specified the alternate educational level as "Other." In part H.8-B., the Petitioner described the "Other" educational level as a "BS+ exp. *Will accept any suitable combo of education, experience, or training.*" (emphasis added). Thus, the labor certification suggests the Petitioner's acceptance of a combination of education, experience, or training equating to a bachelor of science (BS) degree.

If a beneficiary has five years of qualifying experience, however, the definition of "advanced degree" states the minimum educational requirement of an advanced degree professional as a U.S. bachelor's degree or a single, foreign degree equating to a U.S. baccalaureate. See 8 C.F.R. § 204.5(k)(2) (stating the equivalent of a master's degree as "*A United States baccalaureate degree or a foreign equivalent degree* followed by at least five years of progressive experience in the specialty") (emphasis added). The regulation does not permit an equivalent of a U.S. bachelor's degree based on a combination of education, experience, or training. See Final Rule for Employment-Based Immigrant Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (stating that "both the Act and its legislative history make clear that, in order to . . . have experience equating to an advanced degree under the second [preference category], *an alien must have at least a bachelor's degree*") (emphasis added). Thus, contrary to 8 C.F.R. § 204.5(k)(4)(i), the labor certification does not demonstrate the job's requirement of an advanced degree professional.

The Director did not notify the Petitioner of this deficiency or afford it an opportunity to respond. We will therefore remand the matter. On remand, the Director should inform the Petitioner in writing why the labor certification does not support the requested classification and of the company's opportunity to submit rebuttal evidence or argument.

#### IV. ABILITY TO PAY THE PROFFERED WAGE

Also unaddressed by the Director, the record does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). For petitioners with more than 100 employees, like this Petitioner, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements, or a statement from a financial officer establishing its ability to pay the proffered wage. *Id.*

Here, the labor certification states the proffered wage of the offered position of senior consultant-systems analyst as \$109,000 a year. As previously noted, the petition's priority date is June 7, 2018.

The Petitioner submitted a copy of the 2017 annual report of its former parent company and an IRS Form W-2, Wage and Tax Statement, for the same year. The Form W-2 indicates that the Petitioner paid the Beneficiary more than the proffered wage in 2017. But, contrary to 8 C.F.R. § 204.5(g)(2), neither the annual report nor the Form W-2 demonstrates the Petitioner's ability to pay the proffered wage from the petition's priority date of June 7, 2018. The record therefore does not establish the Petitioner's ability to pay the proffered wage.

On remand, the Director's written notice should also ask the Petitioner to submit required evidence of its ability to pay the proffered wage in 2018, the year of the petition's priority date. The Petitioner may also submit additional evidence of its ability to pay that year, including documentation supporting the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The Director should afford the Petitioner a reasonable period to respond to all the issues on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

#### V. CONCLUSION

Contrary to the Director's decision, the record establishes the Beneficiary's possession of the minimum educational requirements of the offered position. The Petitioner, however, has not demonstrated that the accompanying labor certification supports the requested classification, or the company's required ability to pay the proffered wage from the petition's priority date onward.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of T-C-M- Co.*, ID# 6501196 (AAO Oct. 17, 2019)